

***Introductory Note***

*If the pretext case reaches the jury, there is no reason to instruct on McDonnell Douglas burden shifting; that procedure for summary judgment and judgment as a matter of law is likely only to confuse jurors. See Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 429-30 (1st Cir. 2000) (ADEA) (Lynch, J.) (expressing skepticism about whether the direct/circumstantial and the McDonnell Douglas approaches are really very “helpful” and stating that appellate analysis after trial looks instead at “whether the totality of the evidence permits a finding of discrimination”); White v. New Hampshire Dep’t of Corrections, 221 F.3d 254, 264 (1st Cir. 2000) (Title VII) (Bownes, J.) (finding no error in refusal to give explicit instruction on pretext where the instruction presented to the jury focused on “[t]he central issue, which the court must put directly to the jury, . . . whether or not plaintiff was discharged ‘because of [protected conduct]’” (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1017 (1st Cir. 1979) (ADEA) (Campbell, J.))); Zapata-Matos v. Reckitt & Colman, Inc., 277 F.3d 40, 45 (1st Cir. 2002) (Title VII) (Lynch, J.) (“the ultimate question is not whether the explanation was false, but whether discrimination was the cause of the termination”); Sanchez v. Puerto Rico Oil Co., 37 F.3d 712, 720 (1st Cir. 1994) (ADEA) (Selya, J.) (“[W]hen . . . an employment discrimination action has been submitted to a jury, the burden-shifting framework has fulfilled its function, and backtracking serves no useful purpose. To focus on the existence of a prima facie case after a discrimination case has been fully tried on the merits is to ‘unnecessarily evade[] the ultimate question of discrimination vel non.’” (citing U.S. Postal Serv. Bd. of Gvs. v. Aikens, 460 U.S. 711, 713-14 (1983) (Title VII) (Rehnquist, J.))). In Loeb, the First Circuit announced:*

*McDonnell Douglas was not written as a prospective jury charge; to read its technical aspects to a jury, . . . will add little to the juror’s understanding of the case and, even worse, may lead jurors to abandon their own judgment and to seize upon poorly understood legalisms to decide the ultimate question of discrimination. Since the advantages of trial by jury lie in utilization of the jurors’ common sense, we would have serious reservations about using McDonnell Douglas if doing so meant engulfing a lay jury in the legal niceties discussed in this opinion.*

600 F.2d at 1016.

**Pattern Jury Instruction**

[Plaintiff] accuses [defendant] of [protected characteristic]<sup>2</sup> discrimination. Specifically, [she/he] claims that [defendant] took adverse employment action against [her/him] because of [protected characteristic] discrimination.<sup>3</sup>

<sup>4</sup>{An “adverse employment action” is one that, standing alone, actually causes damage, tangible or intangible, to an employee. The fact that an employee is unhappy with something his or her employer did or failed to do is not enough to make that act or omission an adverse employment action.<sup>5</sup> An employer takes adverse action against an employee only if it: (1) takes something of consequence away from the employee, for example by discharging or demoting the employee, reducing his or her salary, or taking away significant responsibilities; or (2) fails to give the employee something that is a customary benefit of the employment relationship, for example, by failing to follow a customary practice of considering the employee for promotion after a particular period of service.<sup>6</sup>}

Even if you were to decide that the [specify adverse action] was neither fair nor wise nor professionally handled, that would not be enough.<sup>7</sup> In order to succeed on the discrimination claim, [plaintiff] must persuade you, by a preponderance of the evidence, that were it not for [protected characteristic] discrimination,<sup>8</sup> [she/he] would not have been [specify adverse action].<sup>9</sup>

[Plaintiff] need not show that [protected characteristic] discrimination was the only or predominant factor<sup>10</sup> that motivated<sup>11</sup> [defendant]. In fact, you may decide that other factors were involved as well in [defendant]’s decisionmaking process. In that event, in order for you to find for [plaintiff], you must find that [she/he] has proven that, although there were other factors, [she/he] would not have been [specify adverse action] without the [protected characteristic] discrimination.

<sup>12</sup>{[Plaintiff] is not required to produce direct evidence of unlawful motive. You may infer knowledge and/or motive as a matter of reason and common sense from the existence of other facts—for example, explanations that were given that you find were really pretextual. “Pretextual” means false or, though true, not the real reason for the action taken.}

---

<sup>2</sup> This instruction is designed for race, color, national origin, religion, sex, pregnancy or age discrimination cases. The ADEA’s prohibition against age discrimination is limited to “individuals who are at least 40 years of age.” 29 U.S.C. § 631(a) (2001). The Introductory Notes at the beginning of these instructions outline the statutory basis for each of these claims.

For sexual harassment cases, see Instructions 2.1-2.3. For disability discrimination cases, see Instruction 3.1. For Equal Pay Act cases, see Instruction 4.1. For retaliation cases, see Instruction 5.1.

<sup>3</sup> The following language may be used in a pregnancy discrimination case:

Under federal law, employers must treat women affected by pregnancy the same, for all employment-related purposes, as other persons not affected by pregnancy but similar in their ability or inability to work. Concern for their safety or that of their unborn children is no justification for different treatment. Safety is a justification only when pregnancy actually interferes with an employee’s ability to perform her job.

See International Union, United Auto., Aerospace and Agric. Implement Workers v. Johnson Controls, Inc., 499 U.S. 187, 204 (1991) (Title VII) (Blackmun, J.) (“Our case law, therefore, makes clear that the safety exception is limited to instances in which sex or pregnancy actually interferes with the employee’s ability to perform the job.”).

In Chevron U.S.A. Inc. v. Echazabal, 122 S. Ct. 2045 (2002), the Supreme Court held that, under the ADA, concern for an employee’s own health is a permissible criterion in employee screening. In light of Johnson Controls, any policy seeking the benefit of Chevron would have to be facially neutral, and not single out pregnant women. See also Smith v. F.W. Morse & Co., 76 F.3d 413, 424-25 (1st Cir. 1996) (“At bottom, Title VII requires a causal nexus between the employer’s state of mind and the protected trait (here, pregnancy). The mere coincidence between that trait and the employment decision may give rise to an *inference* of discriminatory animus, but it is not enough to establish a per se violation of the statute. . . .” (internal citation omitted)).

---

<sup>4</sup> This bracketed paragraph may be used in cases where there is a dispute about whether the action that the defendant allegedly took against the plaintiff constituted an adverse employment action. Although this question, if it arises, is one for the jury, see Melendez-Arroyo v. Cutler-Hammer de P.R. Co., Inc., 273 F.3d 30, 36 (1st Cir. 2001) (ADEA) (Boudin, C.J.) (jury could find that plaintiff who was given a raise but assigned less challenging, largely menial responsibilities suffered an adverse employment action), in most cases the dispute will be about whether the defendant's challenged conduct was motivated by discriminatory animus, not whether it amounted to an adverse employment action. If there is no dispute about whether the alleged conduct, if proven, would constitute an adverse employment action, the bracketed paragraph may be deleted and the words "took adverse employment action against" in the second sentence of the first paragraph may be replaced by a brief description of the adverse employment action defendant allegedly took.

<sup>5</sup> Blackie v. Maine, 75 F.3d 716, 725 (1st Cir. 1996) (FLSA) (Selya, J.) ("[T]he inquiry must be cast in objective terms. Work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action.").

Blackie uses the term "materially adverse employment action," but does not define the term (or, more precisely, the significance of the word "materially") beyond what is included in the text of this instruction. Three other cases also use the modifier "materially" when discussing adverse employment actions, but none of these cases indicates that a materially adverse employment action is different from an adverse employment action. Marrero v. Goya of Puerto Rico, Inc., 304 F.3d 7 (1st Cir. 2002) (Title VII sexual harassment retaliation) (Lipez, J.); Simas v. First Citizens' Federal Credit Union, 170 F.3d 37, 49-50 (1st Cir. 1999) (Federal Credit Union Act; whistleblower retaliation) (Cyr, J.) (applying Title VII definition of adverse employment action); Larou v. Ridlon, 98 F.3d 659, 663 n.6 (1st Cir. 1996) (First Amendment political discrimination) (Cyr, J.) (applying, with reservation, Blackie definition of adverse employment action). Furthermore, none of these cases uses the term "materially adverse employment action" exclusively; all the cases describe employment actions as "materially adverse" and "adverse" interchangeably. Other employment discrimination cases decided after Blackie have referred to adverse employment action without the modifier "materially." See, e.g., Straughn v. Delta Air Lines, Inc., 250 F.3d 23, 33 (1st Cir. 2001) (Title VII and section 1981) (Cyr, J.); Suarez v. Pueblo Int'l, Inc., 229 F.3d 49, 53-54 (1st Cir. 2000) (ADEA) (Selya, J.); White v. New Hampshire Dep't of Corrections, 221 F.3d 254, 262 (1st Cir. 2000) (Title VII) (Bownes, J.).

<sup>6</sup> Blackie v. Maine, 75 F.3d 716, 725 (1st Cir. 1996) (FLSA) (Selya, J.). As the Blackie court noted, this definition is generalized because "[d]etermining whether an action is materially adverse necessarily requires a case-by-case inquiry." Id. Consequently, although there is little explicit guidance in the case law about what constitutes an adverse employment action, there are a number of cases that, by their factual holdings, help define the term. For example, in the majority of cases, the court does not explicitly analyze whether the challenged conduct constitutes an adverse employment action, presumably because certain actions, such as layoffs, salary reductions, and demotions, are generally recognized as adverse employment actions. See, e.g., Straughn v. Delta Air Lines, Inc., 250 F.3d 23 (1st Cir. 2001) (Title VII and section 1981) (Cyr, J.) (termination); Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15 (1st Cir. 1999) (Title VII) (Torruella, C.J.) (demotion); Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999) (salary reduction); see also Welsh v. Derwinski, 14 F.3d 85, 86 (1st Cir. 1994) (ADEA) (Per Curiam) ("Most cases involving a retaliation claim are based on an employment action which has an adverse impact on the employee, i.e., discharge, demotion, or failure to promote."). More helpful, though, are the cases where the court decided whether a jury could reasonably find that the challenged actions constitute adverse employment actions. In some cases, the court has defined what actions are insufficient to constitute an adverse employment action by upholding a trial court's conclusion that the defendant's conduct was not, as a matter of law, actionable. See, e.g., Marrero v. Goya of Puerto Rico, Inc., 304 F.3d 7, 24 (1st Cir. 2002) (Lipez, J.) ("minor, likely temporary, changes in . . . working conditions," extra supervision and probationary period in new post); Hernandez-Torres v. Intercontinental Trading, Inc., 158 F.3d 43, 47 (1st Cir. 1998) (Title VII) (Schwarzer, Sr. Dist. J., N.D. Cal.) (plaintiff was subjected to increased email messages, disadvantageous assignments and "admonition that [he] complete his work within an eight hour [day]"); Blackie, 75 F.3d at 726 (plaintiffs claimed defendants refused to negotiate a "side agreement" to supplement their employment contract); Connell v. Bank of Boston, 924 F.2d 1169, 1179 (1st Cir. 1991) (ADEA) (Campbell, J.) (plaintiff who had already been fired and whose severance package was already calculated was forced to leave office two weeks early). In another useful class of cases, the court held that the challenged employment action could constitute an adverse employment action by either upholding a jury verdict for the plaintiff, see, e.g., White v. New Hampshire Dep't of Corrections, 221 F.3d 254, 262 (1st Cir. 2000) (Title VII) (Bownes, J.) ("ample evidence" of adverse employment action where plaintiff was harassed, transferred without her consent, not reassigned to another position, "and ultimately constructively discharged"), or holding that

the defendant was not entitled to summary judgment on this issue. See, e.g., Melendez-Arroyo v. Cutler-Hammer de P.R. Co., Inc., 273 F.3d 30, 36 (1st Cir. 2001) (ADEA) (Boudin, C.J.) (plaintiff given standard salary increase but assigned less challenging, largely menial responsibilities); DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir. 1997) (Title VII) (Bownes, J.) (plaintiff given five month assignment to job for which he had no experience and deprived of meaningful duties); Randlett v. Shalala, 118 F.3d 857, 862 (1st Cir. 1997) (Title VII) (Boudin, J.) (defendant refused to grant plaintiff a hardship transfer); see also Simas v. First Citizens' Federal Credit Union, 170 F.3d 37, 48, 50 (1st Cir. 1999) (Federal Credit Union Act; whistleblower retaliation) (Cyr, J.) (plaintiff given negative performance evaluations and deprived of responsibility for major account) (applying Title VII definition of adverse employment action).

<sup>7</sup> Thomas v. Eastman Kodak Co., 183 F.3d 38, 64 (1st Cir. 1999) (Title VII) (Lynch, J.) (citing Smith v. Stratus Computer, Inc., 40 F.3d 11, 16 (1st Cir. 1996)) (Title VII) (Stahl, J.) (“Title VII does not grant relief to a plaintiff who has been discharged unfairly, even by the most irrational of managers, unless facts and circumstances indicate that discriminatory animus was the reason for the decision.”); see also Feliciano de la Cruz v. El Conquistador Resort and Country Club, 218 F.3d 1, 8 (1st Cir. 2000) (Title VII) (Lopez, J.) (proof that decision is unfair “is not sufficient to state a claim under Title VII”); Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15, 22 (1st Cir. 1999) (Title VII) (Torruella, C.J.) (“Title VII does not stop a company from demoting an employee for any reason—fair or unfair—so long as the decision to demote does not stem from a protected characteristic.” (citations omitted)); Mesnick v. General Elec. Co., 950 F.2d 816, 825 (1st Cir. 1991) (ADEA) (Selya, J.) (“Courts may not sit as super personnel departments, assessing the merits—or even the rationality—of employers’ nondiscriminatory business decisions.” (citations omitted)).

<sup>8</sup> Case law talks about the “true reason,” “determining factor,” “determinative factor” and “motivating factor,” sometimes using the definite article “the” and sometimes using the indefinite article “a.” The debate recalls causation analysis in tort law with many of the same ambiguities. What does seem clear, however, is that “but for” causation is the standard in pretext cases. Hidalgo v. Overseas Condado Ins. Agencies, Inc., 120 F.3d 328, 332 (1st Cir. 1997) (ADEA) (Stahl, J.) (citing Mesnick v. General Elec. Co., 950 F.2d 816, 823 (1st Cir. 1991) (ADEA) (Selya, J.)); see also Thomas v. Eastman Kodak Co., 183 F.3d 38, 58 (1st Cir. 1999) (Title VII) (Lynch, J.) (“The ultimate question is whether the employee has been treated disparately ‘because of [the protected characteristic].’”); Price Waterhouse v. Hopkins, 490 U.S. 228, 262 (1989) (Title VII) (O’Connor, J., concurring) (“Thus, I disagree with the plurality’s dictum that the words ‘because of’ do not mean ‘but-for’ causation; manifestly they do.”); Ward v. Massachusetts Health Research Institute, Inc., 209 F.3d 29, 38 (1st Cir. 2000) (ADA) (Torruella, C.J.) (describing the analysis of whether the plaintiff was fired “because of” his disability as “but/for reasoning”). We have therefore chosen to avoid the listed terms, which seem to provoke endless debate in charge conferences, and use a simple “but for” instruction (the actual words “but for” are not used because they are far less familiar to lay jurors than to lawyers and judges). We thereby avoid the debate over those terms as reflected in the following case law: Provencher v. CVS Pharmacy, 145 F.3d 5, 10 (1st Cir. 1998) (Title VII retaliation) (Coffin, J.) (“a motivating factor” and “played a part” are problematic phrases; defendant is liable only if discrimination is “the determinative factor”); Carey v. Mt. Desert Island Hospital, 156 F.3d 31, 38-39 (1st Cir. 1998) (Title VII) (Coffin, J.) (The First Circuit has not yet decided whether “the ‘a motivating factor’ language in 42 U.S.C. § 2000e-2(m) applies to all discrimination cases” or only to mixed motive cases.); *id.* at 46 (Stahl, J., dissenting) (“[A] district court errs by giving a jury instruction pursuant to § 2000e-2(m) [e.g., ‘a motivating factor’ language], unless the court determines that the plaintiff has adduced evidence of discrimination sufficient to take the case outside the McDonnell Douglas paradigm. . . .”); St. Mary’s Honor Center v. Hicks, 509 U.S. 502, 542 (1993) (Title VII) (Souter, J., dissenting) (“Congress has taken no action to indicate that we were mistaken in McDonnell Douglas and Burdine.”).

<sup>9</sup> The following sentence may be used in age discrimination cases where the defendant argues that the challenged employment decision was based on a factor, other than age, that is often associated with age or is correlated with age, such as seniority or pension status:

A defendant is entitled to base an employment decision on a factor other than age, such as seniority, even if that factor is often correlated with age, as long as the defendant is not using that other factor as a pretext to hide age discrimination.

See Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 (1993) (ADEA) (O’Connor, J.) (“When the employer’s decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is.”); see also *id.* (“Yet an employee’s age is analytically distinct from his years of service.”); Bramble v. American Postal Workers Union, 135 F.3d 21, 26 (1st Cir. 1998) (ADEA) (Torruella, C.J.) (union that reduced union president’s salary based on

---

president's status as a retiree did not discriminate because, although "there is a positive correlation between active pay status and age, . . . one is not an exact proxy for the other").

<sup>10</sup> See Carey v. Mt. Desert Island Hosp., 156 F.3d 31, 39 (1st Cir. 1998) (Title VII) (Coffin, J.) (instruction "requiring [a verdict for the defendant] if *any* reason other than gender played, however minimal, a part" in the challenged employment decision places too heavy a burden on plaintiff); see also Hazen Paper Co. v. Biggins, 507 U.S. 604, 617 (1993) (ADEA) (O'Connor, J.) ("Once a 'willful' violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation, or prove that age was the *predominant*, rather than a determinative, factor in the employment decision." (emphasis added)).

<sup>11</sup> Although there is dispute about the propriety of the use of the term "a motivating factor," the First Circuit does not appear to be troubled by the word "motivated" when used by itself. See, e.g., Straughn v. Delta Air Lines, Inc., 250 F.3d 23, 35 (1st Cir. 2001) (Title VII and section 1981) (Cyr, J.) (citing Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 54 (1st Cir. 2000) (Title VII) (Wallace, J.) ("termination was motivated by [protected characteristic] discrimination")).

<sup>12</sup> The pretext language used in this bracketed paragraph is permissible and may help the jury understand the issue, but is not required in the First Circuit. Fite v. Digital Equip. Corp., 232 F.3d 3, 7 (1st Cir. 2000) (ADEA and ADA) (Boudin, J.) ("While permitted, we doubt that such an explanation is compulsory, even if properly requested."); White v. New Hampshire Dept. of Corrections, 221 F.3d 254 (1st Cir. 2000) (Title VII) (Bownes, J.) (finding no error in refusal to give explicit instruction on pretext); see also Moore v. Robertson Fire Prot. Dist., 249 F.3d 786, 790 n.9 (8th Cir. 2001) (Title VII) (Bowman, J.) ("We do not express any view as to whether it would ever be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."); Palmer v. Board of Regents of the Univ. Sys. of Ga., 208 F.3d 969, 974-75 (11th Cir. 2000) (Title VII) (Barkett, J.) (no reversible error in refusal to give pretext instruction); Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994) (ADEA) (Easterbrook, J.) (same). But see Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1241 (10th Cir. 2002) (Title VII and section 1981) (Holloway, J.) ("[I]n cases such as this, a trial court must instruct jurors that if they disbelieve an employer's proffered explanation they may-- but need not--infer that the employer's true motive was discriminatory."); Cabrera v. Jakobovitz, 24 F.3d 372, 382 (2d Cir. 1994) (section 1981) (Newman, C.J.) (same); Smith v. Borough of Wilkinsburg, 147 F.3d 272, 280 (3d Cir. 1998) (ADEA) (Sloviter, J.) (same).